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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OSCAR CASTRO LOPEZ, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

MOTORCAR PARTS OF AMERICA, INC., a
New York corporation; FAIRWAY STAFFING
SERVICES, a California corporation; and DOES
1 through 10, inclusive,

Defendants.

Case No.: 21STCV26640

[Assigned for All Purposes to Hon. Bruce G.
Iwasaki]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEY GENERAL'S ACT OF 2004;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: July 20, 2022
Time: 9:00 a.m.
Courtroom: Dept. 58
Judge: Hon. Bruce G. Iwasaki

Action Filed: July 20, 2021
Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on July 20, 2022, at 9:00 a.m., or as soon thereafter as the matter
3 may be heard, in Department 58 of the above-captioned Court, located at 111 N. Hill Street, Los
4 Angeles, CA 90012, Plaintiff OSCAR CASTRO LOPEZ ("Plaintiff") will and hereby does move this
5 Court for an order approving of the PRIVATE ATTORNEYS GENERAL ACT SETTLEMENT
6 AGREEMENT AND RELEASE ("Agreement" or "Settlement") reached with Defendants Motorcar
7 Parts of America, Inc. ("MPA"), and Fairway Staffing Services ("Fairway") (collectively "Defendants"),
8 a true and correct copy of which is attached as Exhibit 1 to the Declaration of H. Scott Leviant submitted
9 herewith.

10 Specifically, the Plaintiff moves for an order to:

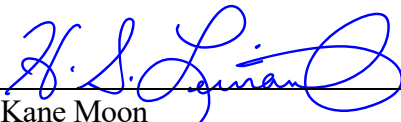
- 11 1. grant approval of the terms of the Agreement pursuant to the Labor Code Private
12 Attorney Generals Act of 2004, Labor Code § 2698, *et seq.*, including the amount of the
13 settlement; the amount of distributions to the State and Aggrieved Employees; the amounts
14 allocated to attorney's fees and costs; the amounts requested for an enhancement award; and, the
15 amount allocated to the settlement administrator; and,
16 2. direct disbursement of the Gross Settlement Amount pursuant to the terms of the
17 Agreement.

18 This motion is based on this Notice, the following Memorandum of Points and Authorities, the
19 Declarations of H. Scott Leviant, Plaintiff, and ILYM submitted herewith, all other pleadings and papers
20 on file in this action, and any oral argument or other matter that may be considered by the Court.

21 Respectfully submitted,

22 Dated: June 27, 2022

MOON & YANG, APC

23 By: 
24 Kane Moon
25 H. Scott Leviant
26 Mariam Ghazaryan

27 Attorneys for Plaintiff OSCAR CASTRO LOPEZ
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this matter, Plaintiff OSCAR CASTRO LOPEZ asserted wage and hour claims against Defendants MPA and Fairway (Plaintiff and Defendants collectively referred to herein as the “Parties”), based upon MPA’s operation of a business that manufactures replacement alternators and starters for imported and domestic cars and light trucks in the United States and Canada and assembles and distributes ignition wire sets for imported and domestic cars and light trucks.

Recognizing that an arbitration agreement would likely preclude class treatment, Plaintiff dismissed his class action and individual wage and hour claims, proceeding with a single claim arising under the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.* (“PAGA”). Under that claim, Plaintiff asserts penalty claims against Defendants, arising from alleged deficient wage and hour policies and procedures. Defendants dispute these claims.

After exchanging documents and voluminous data prior to mediation, Plaintiff and Defendants reached a proposed settlement that will resolve the PAGA claims pending in this action (the “Lawsuit”).

Under the Agreement, Defendant shall pay a maximum sum of **\$200,000.00**, referred to in the Agreement as the Gross Settlement Amount, for aggrieved employees employed in California as non-exempt hourly employees during the designated PAGA period (there were approximately 307 individuals meeting the definition of aggrieved employee as of the mediation date of April 21, 2022). This is a good result, based upon the facts and circumstances discovered to exist.

The proposed settlement will dispose of the PAGA claim alleged in this matter – which was predicated upon certain alleged violations of the Labor Code – on behalf of the California Labor and Workforce Development Agency (“LWDA”) and certain current and former California employees of Defendants who were employed at any time from July 16, 2020 to and including June 20, 2022.

This motion is brought pursuant to Labor Code § 2699.3(b)(4). This motion and the Agreement were served on the LWDA prior to the filing of this Motion. Labor Code § 2699(e)(2).

For the reasons below, Plaintiff requests that the Court enter an order approving the settlement.

II. SUMMARY OF THE TERMS OF SETTLEMENT

The full terms of the settlement are in the Agreement. The key material terms are as follows:

- (a) The Aggrieved Employees: The Aggrieved Employees (also known as the “PAGA Members”) are: “All individuals in California who worked for MPA as hourly-paid or non-exempt employees employed in Operations, and all individuals in California who Fairway deployed to work for MPA as hourly-paid or non-exempt employees in Operations at any time between July 16, 2020 through June 20, 2022.” It is estimated that there are approximately 9,186 pay periods covered by the Settlement. (Agreement, at 1-2, and ¶ 7.)
- (b) No Reversion: The Settlement is *non-reversionary*. (Agreement, ¶ 5.)
- (c) Gross Settlement Amount: Defendants agree to pay the maximum sum of **\$200,000.00** (hereinafter referred to as the “Gross Settlement Amount” or “GSA”) for settlement of the PAGA Penalties, which shall be inclusive of Plaintiff’s Counsel attorney’s fees and costs, a general release payment to Plaintiff, and the settlement administrator’s fees and costs. (Agreement, ¶ 5.)
- (d) Net Settlement Amount (PAGA Fund): At least **\$101,500.00** will be available for distribution to the Aggrieved Employees and the LWDA. Of this amount, the LWDA will receive at least **\$76,125.00** under the Agreement, and Aggrieved Employees will receive at least **\$25,375.00**. (Agreement, ¶ 5.d.)
- (e) Attorney’s Fees: Plaintiff’s Counsel request an award of attorney’s fees in the amount of **\$70,000.00**, which is 35% of the GSA. (Agreement, ¶ 5.a.)
- (f) Litigation Costs: Plaintiff’s Counsel seek reimbursement of actual litigation costs, to a maximum amount of \$15,000. Those actual costs are currently \$16,037.59, which exceeds the capped amount. Therefore, **\$15,000** is requested, by Plaintiff. (Agreement, ¶¶ 5.a, 12.d; Leviant Decl., ¶ 38 and Exh. 2.)
- (g) Settlement Administration: Payment to Aggrieved Employees and administration will be accomplished through third-party settlement administrator Phoenix Settlement Administrators, which has agreed to perform Administrator duties for a flat fee not to exceed **\$6,000.00**, which is reasonable, based on all of the services offered. (Agreement, ¶ 11; Leviant Decl., ¶ 39 and Exh. 3.)

- (h) General Release Payment to Plaintiff: Plaintiff requests approval of an allocation of **\$7,500.00** to Plaintiff from the GSA for his general releases of all potential claims against Defendants and for his effort in bringing and prosecuting this Action. (Agreement, ¶ 5.c.)
- (i) Uncashed Checks: Funds represented by checks returned as undeliverable after a re-mailing, and funds represented by checks remaining un-cashed for more than 180 days after issuance, will be tendered to the Unclaimed Property Fund or like fund. (Agreement, ¶ 12.c.)
- (j) Release: In exchange for the above settlement consideration, Defendants shall be entitled to a *limited* release from the LWDA and each and every Aggrieved Employee, including Plaintiff.¹ (Agreement, ¶ 2; Leviant Decl., Exh. 1.)
- (k) Notice to LWDA: The Declaration of H. Scott Leviant confirms that notice was provided to the LWDA and attaches the confirmatory submission documents. (Leviant Decl., ¶ 43 and Exh. 1.)

III. STATEMENT OF FACTS

Plaintiff alleges that Defendants engaged in practices and procedures that violated the California Labor Code. These alleged statutory violations subject Defendants to potential liability for PAGA penalties pursuant to Labor Code § 2698. Through this action, Plaintiff seeks to recover penalties pursuant to Labor Code § 2698, *et. seq.* (Leviant Decl., ¶ 4.)

Defendant MPA manufactures replacement alternators and starters for imported and domestic cars and light trucks in the United States and Canada and assembles and distributes ignition wire sets for imported and domestic cars and light trucks. Defendant Fairway provided temporary employees to MPA. (Leviant Decl., ¶ 5.) For purposes of this settlement, Defendants employed individuals in various positions in California. (Leviant Decl., ¶ 6.) Plaintiff worked for Defendant MPA in California during the PAGA Period. (Leviant Decl., ¶ 7.) Defendants contend they had lawful policies, including break

¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (concluding that “with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act....”).

1 and pay policies, in effect throughout the statutory period, and viable legal defenses to a substantial
2 portion of the alleged penalty claims. (Leviant Decl., ¶ 8.)

3 **IV. PROCEDURAL HISTORY**

4 On July 16, 2021, Plaintiff's Counsel sent a letter to the LWDA on behalf of Plaintiff, in
5 compliance with California Labor Code § 2699.3. (Leviant Decl., ¶ 9.) More than 65 days passed after
6 the letter was sent to the LWDA, and the LWDA did not indicate that it intended to investigate the
7 alleged violations referenced in the letter. (Leviant Decl., ¶ 10.) On July 20, 2021, Plaintiff filed a class
8 action complaint ("Complaint") in the Superior Court of California, Los Angeles County entitled *Lopez*
9 *v. Motorcar Parts of America, Inc., et al.*, Case No. 21STCV26640 (the "Lawsuit"). On September 24,
10 2021, Plaintiff filed his First Amended Complaint adding a case of action for civil penalties under
11 PAGA. Due to an enforceable arbitration agreement, Plaintiff subsequently requested dismissal of
12 causes of action one through seven, leaving only the PAGA claim. (Leviant Decl., ¶ 11.) Defendants
13 deny all liability and admit to no claim by virtue of their agreement to settle. (Leviant Decl., ¶ 12.)
14 Because Court approval of a PAGA settlement is required, the settlement is presented for approval.
15 (Leviant Decl., ¶ 13.)

16 **V. SETTLEMENT NEGOTIATIONS**

17 Counsel for Plaintiff has thoroughly investigated the facts relating to the claims alleged in the
18 operative complaint and have made a thorough study of the legal principles applicable to the claims
19 asserted against Defendants. Based on their investigation and evaluation of this case, Plaintiff's Counsel
20 have concluded that the settlement is fair, reasonable, and adequate in light of all known facts and
21 circumstances, including the defenses asserted by Defendants, potential adverse findings regarding
22 liability, and numerous potential appellate issues. (Leviant Decl., ¶ 14.)

23 The Parties agreed to participate in a mediation in an effort to resolve the PAGA claims asserted
24 in this matter. The Parties selected mediator Steven Rottman, Esq., a neutral with extensive experience
25 mediating wage and hour class and representative actions. Prior to the mediation, Plaintiff requested
26 substantial data from Defendants, and Defendants provided requested data. (Leviant Decl., ¶ 15.)

27 The Parties participated in a full-day mediation on April 21, 2022, reaching a settlement at that
28 time. The Parties then spent many weeks thereafter negotiating the detailed terms of the Settlement

1 memorialized in a long-form agreement to resolve this matter. (Leviant Decl., ¶ 16.)

2 DISCUSSION

3 VI. THE QUI TAM NATURE OF PAGA CLAIMS

4 This case is solely a PAGA claim, not a class action, and the standard for determining the
5 reasonableness of a settlement has not been the subject of significant judicial discussion. In 2003,
6 California enacted the Private Attorneys General Act of 2004 to remedy systemic underenforcement of
7 many worker protections. *Williams v. Superior Court*, 3 Cal. 5th 531, 545 (2017).

8 The solution enacted by the Legislature deputized private citizens to recover civil penalties for
9 the State, where those penalties were previously only available to State law enforcement agencies:

10 The Legislature declared that ***adequate financing of labor law enforcement was***
11 ***necessary to achieve maximum compliance with state labor laws, that staffing levels***
12 ***for labor law enforcement agencies had declined and were unlikely to keep pace with***
13 ***the future growth of the labor market***, and that it was therefore in the public interest to
allow aggrieved employees, acting as private attorneys general, to recover civil
penalties for Labor Code violations, with the understanding that labor law enforcement
agencies were to retain primacy over private enforcement efforts.

14 *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009) (emphasis added).

15 “Because an aggrieved employee’s action under the Labor Code Private Attorneys General Act
16 of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action
17 binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an
18 action brought by the government.” *Arias*, 46 Cal. 4th at 986. With limited exceptions, “[o]f the civil
19 penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the
20 remaining 25 percent for the ‘aggrieved employees.’” *Iskanian v. CLS Transp. Los Angeles, LLC*, 59
21 Cal. 4th 348, 380 (2014) *certiorari denied sub nom. CLS Transportation Los Angeles v. Iskanian*, —
22 U.S. —, 135 S.Ct. 1155, 190 L.Ed.2d 911 (Jan. 20, 2015). Thus, a PAGA claim is, predominantly, a
23 claim belonging to the State.

24 “The civil penalties recovered on behalf of the state under the PAGA are distinct from the
25 statutory damages to which employees may be entitled in their individual capacities.” *Iskanian*, 59 Cal.
26 4th at 381. Because of this distinction, and the fact that the penalties made available through PAGA
27 fell previously within the exclusive domain of State enforcement, the California Supreme Court
28 explained that PAGA suits are best viewed as a species of *qui tam* action. *Iskanian*, 59 Cal. 4th at 382.

1 After recognizing that PAGA actions are a form of *qui tam* action, *Iskanian* concluded that because the
2 State was the real party in interest in a PAGA suit, it would violate public policy to compel an individual
3 employee to waive representative claims under PAGA: “[W]here, as here, an employment agreement
4 compels the waiver of representative claims under the PAGA, it is contrary to public policy and
5 unenforceable as a matter of state law.” *Iskanian*, 59 Cal. 4th at 384.

6 **VII. THE STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT**

7 In deciding whether to grant approval of the proposed Settlement, the primary issue to be decided
8 is whether the Settlement is fair, adequate, and reasonable. Specifically, the issues are whether the PAGA
9 penalties to which the parties have agreed provide “genuine and meaningful” relief, “consistent with the
10 underlying purpose of the statute to benefit the public” and whether the penalties are reasonable in light
11 of the potential verdict value in this case. *Villalobos v. Calandri Sonrise Farm LP*, 2015 WL 12732709,
12 Case No. CV 12-2615 PSG (JEMx) (C.D. Cal., July 22, 2015).

13 In *O'Connor v. Uber Technologies*, No. 13-CV-03826-EMC, 2016 WL 4398271 (N.D. Cal. Aug.
14 18, 2016) the court was faced with a proposed class action settlement which also included a claim under
15 PAGA. The court separately discussed the standard for approval under PAGA. The court recognized that
16 cases discussing class action standards may be helpful and required the parties to demonstrate that either
17 the factors set forth in the class action case of *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
18 1998) “or any other coherent analysis” justified the proposed settlement of the PAGA claim.²

19 Therefore, although class settlement jurisprudence has no direct application to this case, it is not
20 inappropriate to consider the *Hanlon* factors: (1) the strength of the plaintiff's case; (2) the risk, expense,
21 complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent
22 of discovery completed and the stage of the proceedings; (5) the experience and views of counsel; and
23 (6) the presence of a government participant.

24 The *Hanlon* court also mentioned, as a factor, the “reaction of the class members to the proposed
25 settlement.” That factor has no analogous component here. The interest served is that of the State of
26

27 ² The *O'Connor v. Uber* court did not approve the settlement, finding the disparity between the
28 amount proposed for the class compared to the PAGA settlement was not fair to the LWDA. That is not
a concern here. Seventy-five percent of the net will be paid to the LWDA by statute.

1 California and the LWDA is the only person or entity who has standing to comment upon any settlement.
2 Labor Code § 2699.3(b)(4). The *Hanlon* court also identified “the risk of maintaining class action status
3 throughout the trial” as a factor, but, again, that factor has no application here. Otherwise, the six
4 remaining factors provide a useful framework for evaluating the settlement. *Hanlon*, 150 F.3d at 1026;
5 *see also Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (same); *Churchill Vill., L.L.C. v. Gen.*
6 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (same).

7 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996), held that “a presumption of fairness
8 exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
9 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
10 similar litigation; and (4) the percentage of objectors is small.”³ *Id.* at 1801; *In re Microsoft I-V Cases*,
11 135 Cal. App. 4th 703, 723 (2006); *see also* Newberg & Conte, *Newberg on Class Actions*, (2d.Ed.
12 1987) § 11.41, p. 11-91.

13 It would also be appropriate for this court to look to case law concerning settlement of a claim
14 brought under the Fair Labor Standards Act 28 U.S.C. § 201 et seq. (“FLSA”) which, likewise, requires
15 court approval. Because the Ninth Circuit has not established a standard for district courts to follow when
16 evaluating an FLSA settlement, California district courts have applied the standard established by the
17 Eleventh Circuit in *Lynn’s Food Stores, Inc. v. U.S. By & Through U.S. Dept of Labor*, 679 F.2d 1350,
18 1352 (11th Cir. 1982). *See Dunn v. Teaches Ins. & Annuity Ass’n of Am.*, 2016 WL 153266, at *3 (N.D.
19 Cal. Jan. 13, 2016) and *Ambrosino v. Home Depot U.S.A., Inc.*, No. 11 CV 1319 L (MDD), 2014 WL
20 3924609, at * 1 (S.D. Cal. Aug. 11, 2014) (“A district court may approve an FLSA settlement if the
21 proposed settlement reflects ‘a reasonable compromise over [disputed] issues.’”) (quoting *Lynn’s Food*
22 *Stores, Inc.*, 679 F.2d at 1354). Although the standard for approving FLSA collective actions may be
23 different from the standard for approving class actions under Federal Rule of Civil Procedure 23, courts
24 have applied the *Hanlon* factors to a settlement of an FLSA claim. *Millan v. Cascade Water Sews., Inc.*,
25

26 ³ PAGA provides no notice or claim procedures as exist in class action cases. Therefore, objections
27 (other than potentially by the LWDA) are not contemplated in PAGA actions. Despite the absence of
28 any right to object, the Agreement here contemplates informing Aggrieved Plaintiffs of the resolution so
that they are made aware of the result, despite having no standing to object to this settlement.

1 No. 1:12 - cv -1821-AWI-EPG, 2016 WL 3077710, at * 3 (E.D. Cal. Jun. 2, 2016); see also *Otey v.*
2 *CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2014 WL 1477630, at * 11 (N.D. Cal. Apr. 15, 2014). In
3 *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016) the court
4 evaluated an FLSA settlement using a totality of the circumstances approach “that replicates the factors
5 relevant to Rule 23 class actions where appropriate, but adjusts or departs from those factors when
6 necessary to account for the labor rights at issue.”

7 While a court should not simply “rubber stamp” a proposed settlement with little or no
8 independent evaluation, the court “must stop short of the detailed and thorough investigation that it
9 would undertake if it were actually trying the case.” *Clark v. Am. Residential Sews. LLC*, 175 Cal. App.
10 4th 785, 799 (2009). The court should not expect that the parties offer concrete “proof” in support of
11 settlement, but rather that the parties have made a good faith effort to explain the reasoning behind
12 certain strategic decisions and the valuation of specific claims. “[W]hether a settlement is fundamentally
13 fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in
14 the estimation of the reviewing court.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). “It is,
15 of course, the strong public policy of this state to encourage the voluntary settlement of litigation.”
16 *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1359 (2007).

17 Finally, the factors identified above are not exclusive and the court is free to balance factors
18 depending on circumstances. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 244-245 (2001).

19 While class settlement factors provide some guidance as to how a Court may approach the
20 evaluation of a PAGA settlement, there are significant differences between PAGA settlements and class
21 action settlements that must be recognized. Unlike a class action settlement, the scope of release
22 permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is binding not only on
23 the named employee plaintiff but also on government agencies and any aggrieved employee not a party
24 to the proceeding,” *Arias*, 46 Cal. 4th at 986, “the nonparty employees, because they were not given
25 notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to
26 remedies other than civil penalties.” *See id.*, at 987. Thus, with the possible exception of a Plaintiffs, the
27 scope of a release in a PAGA settlement is confined to PAGA penalties, and not related individual
28

claims.⁴ Applying the above standards to this settlement, the settlement meets all criteria for approval.

VIII. THE SETTLEMENT MEETS ALL THE CRITERIA FOR APPROVAL

Applying the class settlement fairness factors discussed above – limited to those compatible with the unique features of PAGA claims – the proposed settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for approval.

A. The Relative Strength of the PAGA Claim, and the Realistic Range of Outcomes in the Litigation, Strongly Favor Approval of the Settlement

“In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation omitted). Here, the relative strength of the PAGA claim brought by Plaintiffs weigh in favor of the Court finding that the settlement is fair, adequate, and reasonable, since there are significant risk factors that Plaintiffs would face if they did not settle this matter.

Most significantly, the ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: “In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Subdivision (a) states, “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action

⁴ This is contrasted with the much broader release permitted in a class action context, which may be based on “any matter or fact” alleged in the complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) (“The weight of authority establishes that ... a court may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.”); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“we have held that federal district courts properly released claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement.”). In this matter, the Agreement will not affect the rights of Aggrieved Employees who may possess individual wage and hour claims.

1 brought by an aggrieved employee on behalf of himself or herself and other current or former employees
2 pursuant to the procedures specified in Section 2699.3.” Subdivision (f) specifies the penalties in
3 instances where the underlying statute does not specify any civil penalty. In other words, where the facts
4 and circumstances of the case demonstrate that an unreduced award would be “unjust, arbitrary and
5 oppressive, or confiscatory,” the court (or arbitrator) may reduce the award to ameliorate such.

6 In *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate
7 because “[t]his does not appear to be a case where a company has deliberately sought to evade the law.”
8 *Cotter*, 176 F. Supp. 3d at 941. Here, Defendant can state a strong case that, as the Court concluded in
9 *Cotter*, its efforts to devise compliant operational policies do not indicate an organization that has
10 deliberately sought to evade the law. This is a very significant risk factor. Defendant disputes that
11 Plaintiffs could find a coherent method for proving liability for roughly 307 employees working in
12 different department. Establishing violations for purposes of PAGA would be difficult in this matter.

13 After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement
14 is fair, adequate, and reasonable. (Leviant Decl., ¶ 23.)

15 Using the most straightforward formulation of applying the “catch-all” \$100 penalty specified in
16 Labor Code § 2699(f)(2) to each pay period per employee, for all of the estimated 9,186 pay periods
17 through mediation, the maximum plausible exposure under that direct approach is **\$918,600.00**. The
18 Settlement of **\$200,000** is about 21% of that roughly estimated maximum exposure value, a good result.
19 When considering the serious risks discussed herein, and the Court’s inherent power to adjust penalties
20 downward to reflect an employer that sought to be in compliance with wage and hour laws, even if
21 mistakes were sometimes made, the compromise figure is reasonable.

22 The Settlement can also be evaluated by looking at each allegation and the penalty that would
23 attach thereto. The Settlement of **\$200,000** is 135% of the **\$147,923.75** estimate of *risk-adjusted* penalty
24 recovery (excluding interest) at this stage in the litigation, *based upon a penalty-by-penalty analysis*. On
25 that basis, it would be unwise to pass up this settlement opportunity. This assessment is based on a
26 carefully constructed model of the current fair value of the case, using estimated risks, appellate
27 authority, and estimates of violation frequency by pay period. (*Id.*)

28 The maximum calculated plausible exposure is **\$845,600.00**, *when examining each penalty*

1 *provision separately. (Id.)* That exposure consists of the following components:

- 2 • The reasonably estimated penalty exposure for unpaid minimum wage off-the-clock
3 work (Labor Code § 1194) was estimated to be **\$115,200.00**. The risk-adjusted estimated
4 exposure is estimated to be **\$28,800.00**, based on a risk reduction of 75%, before any
5 Court-imposed reductions for good faith conduct by Defendant.
- 6 • The reasonably estimated penalty exposure for unpaid overtime for off-the-clock work
7 (Labor Code § 558) was estimated to be **\$115,200.00**. Based on the fact that the claim
8 would likely not affect all employees, the risk-adjusted estimated exposure is estimated to
9 be **\$28,800.00**, based on a risk reduction of 75%, before any Court-imposed reductions
10 for good faith conduct by Defendant.
- 11 • The reasonably estimated penalty exposure for late payment of wages owed (Labor Code
12 § 210) was calculated to be **\$115,200.00**. Based on the fact that the claim would likely
13 not affect all employees, the risk-adjusted estimated exposure is estimated to be
14 **\$28,800.00**, based on a risk reduction of 75%, before any Court-imposed reductions for
15 good faith conduct by Defendant. This penalty is contingent on unpaid wage penalties.
- 16 • The reasonably estimated exposure for meal break violations over the class period was
17 calculated at **\$102,800.00**. Based on the records of facial violations and the serious risk
18 that employee choice would become an issue that impeded proof, the risk-adjusted
19 estimated exposure is estimated to be **\$10,280.00**, based on a risk reduction of 90%,
20 before any Court-imposed reductions for good faith conduct by Defendant.
- 21 • The reasonably estimated exposure for rest break violations over the class period was
22 determined to contribute negligible value, since there are no records of violations and the
23 employer policy is not clearly deficient. Individual testimony would be required for this
24 penalty from each employee.
- 25 • The risk-adjusted penalty recovery for violation of Labor Code § 203 was estimated to be
26 approximately **\$23,040.00**, on a maximum exposure of **\$115,200.00**. A risk reduction of
27 80% was applied to reflect the contingent nature of this claim and the additional need to
28 demonstrate willful misconduct.

- The risk-adjusted penalty recovery for violation of Labor Code § 226 was estimated to be approximately **\$28,200.00**, on a maximum exposure of **\$282,000.00**. A risk reduction of 90% was applied to reflect the contingent nature of this claim and the additional need to demonstrate willful misconduct.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$845,600.00**. (*Id.*)

The concurrently-filed Leviant Declaration sets forth claim valuation. (*See*, Leviant Decl., ¶ 23.)

B. The Risk, Expense, and Complexity of Further Litigation Balances Strongly in Favor of Approval of the Settlement

To assess the fairness, adequacy, and reasonableness of a class action settlement, the court should consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at 1801. Here, the expense, complexity and likely duration of future litigation was to some extent an unknown. However, what is certain is that to adequately establish the foundational violations that would support a substantial penalty award, tremendous time and expense would be invested. To adequately establish that aggrieved employees experience the alleged violations, and at what frequency, most of the aggrieved employees would need to be interviewed in a systematic fashion and their testimony cataloged in way sufficiently meaningful to permit the submission of summary evidence at trial, such as via survey. *First*, the burdensome nature of such a process would be expensive and time-consuming. *Second*, the individuals already interviewed confirmed substantial risk that the Court would either substantially reduce any penalty ultimately awarded *or* conclude that the conduct was insufficient to support a penalty award. *Third*, it would be essentially impossible to formulate an objectively reliable means of summarizing testimonial experiences, other than by an extraordinarily detailed survey. And formulating such a survey would have been important, since frequency of violations would need to be established before any penalties could be recovered. (Leviant Decl., ¶ 22.) In sum, the evidence collected to date leads Plaintiff to conclude that, to the extent violations occurred, a fact which Defendants dispute, the violations were **not** systematic and **not** uniform across all of Defendants' employees who worked during the relevant period. Alternatively, direct testimony would have been required from as many of the roughly 307 aggrieved employees as could be obtained, which would be, at best, very difficult.

1 **C. The Amount Offered in Settlement Under the Agreement**

2 The Settlement provides a monetary benefit that falls well within “the range of an acceptable
3 settlement” under the circumstances, which is the standard on which the instant Settlement must be
4 judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where it only
5 provides a fraction of what could have been obtained at trial. *See Linney v. Cellular Alaska P'ship*, 151
6 F.3d 1234, 1242 (9th Cir. 1998).

7 **1. The Total Amount Offered in Settlement is \$200,000.00**

8 Under the Agreement, Defendant shall pay a maximum sum of \$200,000.00. Plaintiff's Counsel,
9 with the assistance of a data analyst, assessed the maximum plausible penalty exposure to be
10 **\$845,600.00**. (Leviant Decl., 23.) This estimate is overly optimistic. The Settlement is 24% of that
11 maximum plausible exposure before factoring in the many risk adjustments (*e.g.*, employee choice
12 would be an issue on rest break and meal period claims) and the Court's ability to reduce the penalty.

13 Furthermore, Defendant asserted a number of defenses that potentially could have undermined
14 Plaintiff's claims if they were to be litigated. For example, Defendants contended that Plaintiff's claims
15 would be unmanageable under *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746, 865
16 (2021). Specifically, Defendants argued that numerous individualized inquiries would be needed to
17 determine liability on Plaintiff's claims, including (1) whether employees worked off-the-clock with
18 knowledge of a supervisor or Defendants, (2) whether each individual took a particular meal period or
19 rest break on a particular occasion, (3) whether the meal period was waived, and (4) where the individual
20 skipped the meal or rest period, *why* it was skipped for each of the allegedly aggrieved employees.

21 Defendants argued the case would be unmanageable.

22 **2. Payment of At Least \$101,500.00 in Penalties**

23 Under the Agreement, the amount available for distribution as penalties under PAGA is at least
24 **\$101,500.00**. The amount is a significant penalty, but it is not confiscatory, nor is it, in the terms of the
25 PAGA statute, “unjust, arbitrary, or oppressive.” Labor Code § 2699(e)(2).

26 a) *The LWDA shall receive at least \$76,125.00*

27 As 75% of the penalties are allocated to the LWDA, the LWDA stands to receive at least
28 **\$76,125.00** under the Agreement. Further, pursuant to Labor Code § 2699.3(b)(4) the “provisions of the

1 settlement relating to health and safety laws shall be submitted to the division at the same time that they
2 are submitted to the court. This requirement shall be construed to authorize and permit the division to
3 comment on the settlement provisions, and the court shall grant the division's commentary appropriate
4 weight.” The LWDA will have an opportunity to comment upon the amount to be paid to the LWDA.
5 This provision protects against collusive settlements for less than a reasonable value of the claim.

6 *b) Aggrieved Employees shall receive at least \$92,795.42*

7 Approximately 307 Aggrieved Employees shall receive at least **\$25,375.00** (25% of the penalty)
8 under the terms of the Agreement and by operation of PAGA. The Court should give weight to the fact
9 that the primary purpose of PAGA is not to provide a windfall to Aggrieved Employees; the penalties
10 recovered under PAGA are not surrogate individual damages. Instead, the amount available to
11 Aggrieved Employees is in addition to any damages that could be recovered via individual claims.

12 **D. The Presence of a Government Participant**

13 As set forth above, 75% of the penalty is paid to the LWDA. In connection therewith, Labor
14 Code § 2699.3(b)(4) permits the LWDA to comment on the penalties. This provides an independent
15 check on collusive settlements. The LWDA was notified of the Settlement. (Leviant Decl., ¶ 43.)

16 **E. PAGA Counsel Are Experienced and Negotiated Aggressively**

17 The court may also consider that negotiations between the Parties were conducted at arm's
18 length, in an adversarial manner, despite a mutual desire to resolve the case. (Leviant Decl. ¶¶ 15-16.)
19 The court may consider the opinion of all counsel that the settlement arrived at is fair, reasonable and in
20 the best interests of the aggrieved employees. PAGA Counsel are experienced with employment class
21 and representative actions, as set forth more fully in the Declaration of H. Scott Leviant filed herewith.

22 **F. The Substantial Exchange of Data and the Stage of the Proceedings Favor Approval**

23 In evaluating the Parties' basis for valuing a settlement, ““formal discovery is not a necessary
24 ticket to the bargaining table.”” *Linney*, 151 F.3d at 1239.

25 Here, the substantial exchange of data was sufficient to enable Plaintiff's Counsel to evaluate the
26 strength and value of the claim for purposes of settlement. (Leviant Decl., ¶¶ 19, 21-22.) As discussed
27 above, Plaintiff's Counsel spoke with employees, reviewed policies, performed calculations with data,
28 and inspected related documents, such as handbooks and wage statements, to assess exposure and risk.

1 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such investigation
2 was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this
3 claim for purposes of settlement. (Leviant Decl., ¶ 21.)

4 **G. Additional Factors Weigh in Favor of Approving the Terms of the Proposed**
5 **Settlement, Including the Requested Fees and Costs**

6 In addition to the factors presented above, the proposed settlement does not possess any obvious
7 deficiencies with respect to its other terms, including the agreed-upon fees and costs.

8 **1. Fees and Costs**

9 Courts in the Ninth Circuit and California generally use the "percentage method" rather than the
10 lodestar approach when awarding attorneys' fees in a common fund settlement. *See* 7 Witkin, B.E.,
11 CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage
12 method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a
13 lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled
14 to a reasonable attorney's fee from the fund as a whole"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373,
15 1377-78 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). *See generally*, *Serrano*, 20 Cal. 3d
16 at 25; *accord Hanlon*, 150 F.3d 1011 (9th Cir. 1998). While this settlement is what is traditionally
17 imagined when using the term "common fund," it does create benefit for others beyond Plaintiff.

18 According to a leading treatise on class actions, "No general rule can be articulated on what is a
19 reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee
20 award from a common fund in order to assure that the fees do not consume a disproportionate part of the
21 recovery obtained for the class, although somewhat larger percentages are not unprecedented." *See*
22 Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 14.03. Attorneys' fees that are fifty percent of
23 the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in***
24 ***cases where the settlement is relatively small.*** *See id*; *see also*, *Van Vranken v. Atlantic Richfield*
25 *Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded
26 involved "smaller" settlement funds of under \$10 million).

27 While this is not a class action, the custom and practice in class actions is to award approximately
28 one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008)

1 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used,
2 fee awards in class actions average around *one-third* of the recovery.”) (emphasis added). The proposed
3 attorney fee award here is 35% of the Gross Settlement Amount, and amount reasonably comparable to
4 “average” fees awarded in California state court class action cases used for comparison purposes here.
5 *Chavez*, 162 Cal. App. 4th at 66 n. 11. Again, this is *not* a class action. It is more akin to contingent
6 representation with an additional requirement of Court review due to the qui tam nature of a PAGA
7 claim.

8 As a PAGA claim is unique to California, it is also appropriate to consider how California treats
9 common fund recoveries. The California Supreme Court removed all doubt about the use of the
10 percentage of the fund method to award attorney’s fees in California, stating, “We join the overwhelming
11 majority of federal and state courts in holding that when class action litigation establishes a monetary
12 fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel
13 a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate
14 percentage of the fund created.” *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).⁵

15 Thus, Ninth Circuit and California courts regard circumstances in which class counsel’s work is
16 wholly contingent, such as in class actions and other common fund type cases, as a factor weighing in
17 favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal.
18 4th 1122, 1132-33 (2001). This matter has been litigated by Plaintiff’s Counsel in a manner that is
19 reasonable, diligent, and efficient. The actual lodestar incurred by Plaintiff’s Counsel to date is no less
20 than \$82,944.50 not including at least \$3,975 in unbilled time and \$3,975 in estimated future work.
21 (Leviant Decl., ¶¶ 35-36.) Attorneys for Plaintiff invested substantial amounts of time evaluating data
22 before the mediation in this matter, revising damage models, and in preparing for the mediation. Those
23 efforts led to this reasonable settlement. (Leviant Decl., ¶ 34-36.) Plaintiff’s Counsel requests
24 **\$70,000.00**, as specified in the Settlement, which constitutes a “negative” lodestar multiplier of 0.77,
25

26
27 ⁵ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
28 doubt about the use of the percentage method: “The *Dunk* court, while finding the percentage method
inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases.” *Laffitte*, at 501.

when compared to recorded, unbilled, and estimated future lodestar of **\$90,894.50**. (Leviant Decl., ¶ 37.)

The Agreement also provides for the award of actual costs, up to \$15,000, based on Plaintiff's Counsel's actual out of pocket expenses in taking on representation in this Lawsuit on a contingency basis. (Leviant Decl., ¶ 38.) Because the costs already incurred (at least \$16,037.59) already exceed the cap, Plaintiff requests an award of **\$15,000.00** in costs. (Leviant Decl., ¶ 38.)

2. Administration Fees Are Very Reasonable

Administration will be completed by Phoenix Settlement Administrators for **\$6,000.00**, a very reasonable amount for the services rendered. (Leviant Decl., ¶ 39 and Exhibit 4; Moore Decl., ¶ 9.)

3. The Payment to Plaintiff Constituting Consideration for His General Release and Enhancement Award Is Appropriate and Reasonable

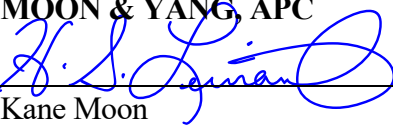
Courts routinely approve enhancement payments to compensate named plaintiffs for the services they provide and the risks they incur during representative litigation. *See, e.g., Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs); *Van Vranken, supra*, (approving \$50,000 incentive payment). Here, Plaintiff seeks approval of a payment of \$7,500. This request is reasonable given (1) the general release of all claims that Plaintiff is providing, and (2) the contributions made by Plaintiff when he brought his cases and the risks he undertook on behalf of Aggrieved Employees. Plaintiff provided substantial factual information and documents to counsel, assisted in identifying potential witnesses, and participated in multiple conferences with Plaintiff's counsel. *See* Lopez Decl., ¶¶ 4-7. Accordingly, Plaintiff's requested payment is appropriate as part of the Settlement, and Plaintiff request that the Court approve an award of \$7,500 to Plaintiff.

IX. CONCLUSION

For the above reasons in fact and law, Plaintiff requests this court enter an order approving the settlement memorialized in the Agreement.

Respectfully submitted,

Dated: June 27, 2022

MOON & YANG, APC
By: 
Kane Moon
H. Scott Leviant
Attorneys for Plaintiff OSCAR CASTRO LOPEZ

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7th Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEY GENERAL'S ACT OF 2004; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending ☐ the original [or] ☒ a true copy thereof ☒ to interested parties as follows [or] ☐ as stated on the attached service list:

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STAFFING SERVICES

☐ **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

☒ **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

☐ **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

☐ **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this **June 27, 2022** at Los Angeles, California.

H. Scott Leviant
Type or Print Name


Signature